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GEORGIA-PACIFIC CONSUMER PRODUCTS LP

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GEORGIA-PACIFIC CONSUMER
PRODUCTS LP, a Delaware limited
partnership,

Plaintiff,

v.

LEE'S GENERAL TOYS, INC., a California
corporation, JOHN LEE, an individual; and
DOES 1-10,

Defendants.

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY JCNH DEPUTY

Civil Action No. **07 CV 2391 BTM AJB**
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF GEORGIA-PACIFIC
CONSUMER PRODUCTS LP'S EX
PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

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1 **I. INTRODUCTION**

2 Plaintiff Georgia-Pacific Consumer Products LP ("Georgia-Pacific") is a world leader in
 3 the manufacturing and marketing of tissue products, among a variety of other products. Among
 4 these products are **ANGEL SOFT®** and **ANGEL SOFT PS®** brands of bathroom tissue.
 5 Through Georgia-Pacific's substantial advertising and quality control programs, consumers have
 6 come to associate the **ANGEL SOFT®** and **ANGEL SOFT PS®** brands of bathroom tissue
 7 with Georgia-Pacific and its corresponding reputation for quality products. As a result of
 8 Georgia-Pacific's significant investment of time, money and effort, the **ANGEL SOFT®** and
 9 **ANGEL SOFT PS®** brands have enjoyed enormous success. Total retail sales of **ANGEL**
 10 **SOFT®** and **ANGEL SOFT PS®** products exceed many hundreds of millions of dollars.

11 As part of its effort to protect these successful brands, Georgia-Pacific and its
 12 predecessors in interest applied for and obtained several federally registered trademarks
 13 containing the words "Angel Soft." Georgia-Pacific has used the **ANGEL SOFT®** name and its
 14 related trademarks to identify its bathroom tissue products since 1944. Through continuous use
 15 and notoriety, some of these trademarks have become both famous and incontestable. Equally
 16 important, the **ANGEL SOFT®** and **ANGEL SOFT PS®** trademarks have become
 17 extraordinarily valuable as identifiers of Georgia-Pacific and its bathroom tissue products.

18 Georgia-Pacific recently became aware that Defendants Lee's General Toys and John
 19 Lee (collectively "Defendants") are distributing, marketing, and selling a variety of "Angelite"
 20 bathroom tissue products in retail and wholesale locations in Southern California, including
 21 within the County of San Diego, under the name "Angel Lite" or Angelite" (hereinafter
 22 "Angelite").

23 Defendants' inferior-quality "Angelite" products bear marks and images that are
 24 confusingly similar to the **ANGEL SOFT®** and **ANGEL SOFT PS®** trademarks. Defendants'
 25 use of the word "Angel" or "Angelite" in their product labeling is inherently misleading and
 26 suggests an affiliation with Georgia-Pacific's superior, and well-known **ANGEL SOFT®**
 27 bathroom tissue products. Indeed, Defendants' selection of the word "Angel" or "Angelite"—an
 28 arbitrary mark which has nothing whatsoever to do with bathroom tissue products—reveals

1 Defendants' intention to capitalize upon Georgia-Pacific's goodwill. Furthermore, the striking
 2 similarities in packaging appearance between Defendants' "Angelite" products and Georgia-
 3 Pacific's **ANGEL SOFT®** products renders consumer confusion between the two product lines
 4 inevitable. In particular, Defendants' "Angelite" product label employs lettering that is virtually
 5 identical in appearance to the lettering used on **ANGEL SOFT®** packaging.

6 A side-by-side comparison of the infringing "Angelite" product and Georgia-Pacific's
 7 **ANGEL SOFT PS®** bathroom tissue, which illustrates these similarities in product labeling and
 8 packaging design, is shown below:



17 The remarkable similarities of Defendants' "Angelite" bathroom tissue labeling and
 18 packaging to Georgia-Pacific's **ANGEL SOFT®** branded products will certainly confuse
 19 consumers. This confusion of Georgia-Pacific's **ANGEL SOFT®** and **ANGEL SOFT PS®**
 20 bathroom tissue customers and the diversion of Georgia-Pacific's sales to the "Angelite" product
 21 undoubtedly will disappoint customers and irreparably harm Georgia-Pacific and its reputation
 22 for quality bathroom tissue products. Accordingly, Georgia-Pacific brings this application for a
 23 temporary restraining order to avoid the inevitable irreparable harm that Defendants'
 24 importation, distribution, marketing, and sales of their "Angelite" bathroom tissue will bring to
 25 Georgia-Pacific's reputation and goodwill.

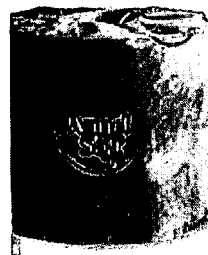
1 **II. BACKGROUND**

2 **A. Georgia-Pacific's ANGEL SOFT® Federally Registered Trademarks**

3 Through its predecessors in interest, Georgia-Pacific first developed and began using the
4 **ANGEL SOFT®** brand in 1944 in connection with its bathroom tissue products. Declaration of
5 Andrew Towle ("Towle Decl.") ¶ 3. Georgia-Pacific and its predecessors in interest have used
6 the **ANGEL SOFT®** mark as such continuously since that time. *Id.* ¶ 4. The picture shown in
7 below depicts the current product configuration and packaging of a typical **ANGEL SOFT®**
8 retail product:




14 In 2003, Georgia-Pacific also developed and began using the **ANGEL SOFT PS®** brand
15 for bathroom tissue that it distributes through commercial channels. *Id.* ¶ 5. The picture shown
16 below depicts the current product configuration and packaging of a typical **ANGEL SOFT PS®**
17 commercial product:



23 Georgia-Pacific and its predecessors in interest have applied for and obtained several
24 federally registered trademarks that protect both its **ANGEL SOFT®** and **ANGEL SOFT PS®**
25 brands of bathroom tissue. *Id.* ¶ 7. These trademarks include Registration Numbers 781,414;
26 1,172,215; 2,512,417; 2,546,897; 2,841,759; 2,912,982; 2,972,819; and 2,989,711. *Id.*; Exs. 3-
27 10. For purposes of this Application, and for the sake of brevity and efficiency, Georgia-Pacific
28 alleges violations only of Registration Numbers 781,414; 1,172,215; 2,512,417; and 2,912,982

(collectively referred to herein as the "ANGEL SOFT Trademarks"), which are described below:

Reg. No.	Mark	Filing Date	Registration Date	Date of First Use
781,414	ANGEL SOFT	08/07/1962	12/08/1964	00/00/1944
1,172,215	ANGEL SOFT	08/13/1979	10/06/1981	00/00/1944
2,512,417		11/21/2000	11/27/2001	05/01/2000
2,912,982	ANGEL SOFT PS	08/26/2003	12/21/2004	01/31/2003

Id. ¶ 7; Exs. 3-5. In accordance with 15 U.S.C. § 1065, based upon widespread and continuous use, Registration Numbers 781,414 and 1,172,215 have achieved incontestable status.

B. Sales of Georgia-Pacific's ANGEL SOFT® Brand Bathroom Tissue

Georgia-Pacific sells bathroom tissue under the ANGEL SOFT Trademarks in both the retail and commercial channels throughout the United States, including Southern California and the County of San Diego, as well as in Canada and Mexico. *Id.* ¶ 9, 11. ANGEL SOFT® bathroom tissue is sold through the retail channel in large retail chain stores such as Wal*Mart, Target, Winn Dixie, and Walgreen's as well as in tens of thousands of independent retail stores located across the country. *Id.* ¶ 11. Georgia-Pacific sells its ANGEL SOFT PS® bathroom tissue in the commercial channel to distributors such as US Foodservice, SYSCO, Xpedx, and Lagasse Sweet, which then distribute ANGEL SOFT PS® to well-known commercial end users such as Hampton Inn, Sheraton Hotels, The Walt Disney Company, Hyatt Hotels and Little Caesar Enterprises, Inc. *Id.*

The products sold under the ANGEL SOFT Trademarks must meet Georgia-Pacific's rigorous standards of quality. *Id.* ¶ 19. As a result, Georgia-Pacific endures significant expense to ensure that its products sold under the ANGEL SOFT Trademarks adhere to high quality standards. Some examples of the quality control efforts in place by Georgia-Pacific include, but are not limited to: measuring and controlling the quality of the base sheet of the bathroom tissue

1 during production; measuring and recording the finished bathroom tissue rolls at least once per
 2 day per manufacturing line; conducting periodic workmanship audits of the bathroom tissue
 3 itself as well as the packaging, box and pallet; and conducting softness panels to judge sensory
 4 softness. *Id.*

5 Due in part to the distinctive and widely recognized **ANGEL SOFT** Trademarks and
 6 trade dress and these products' superior quality, Georgia-Pacific's **ANGEL SOFT®** and
 7 **ANGEL SOFT PS®** brands of bathroom tissue have been extremely successful. Since the
 8 brand's launch in 1944, Georgia-Pacific has sold several hundred million wrappers of **ANGEL**
 9 **SOFT®** branded bathroom tissue bearing the Georgia-Pacific trade dress, generating many
 10 hundreds of millions of dollars in retail sales. *Id.* ¶¶ 9, 10. By way of example, from 2004
 11 through 2006 alone, U.S. sales of bathroom tissue sold under the **ANGEL SOFT** Trademarks
 12 totaled over \$2 billion. *Id.* Moreover, according to AC Nielsen market share data for the year
 13 ending September 08, 2007, the **ANGEL SOFT®** brand of bathroom tissue ranked second in
 14 total dollar sales. *Id.* ¶ 18. Georgia-Pacific's sales of **ANGEL SOFT®** and **ANGEL SOFT**
 15 **PS®** brands of bathroom tissue have resulted in widespread customer recognition of the Georgia-
 16 Pacific trade dress as an identifier of Georgia-Pacific and its high-quality products. *Id.* ¶ 18.

17 **C. Georgia-Pacific's Extensive Advertisement and Promotion of the ANGEL**
 18 **SOFT® Product Line**

19 Georgia-Pacific has invested heavily in advertising and promoting its **ANGEL SOFT®**
 20 brand and products for more than six decades. *Id.* ¶ 12. In the U.S. in 2006 alone, Georgia-
 21 Pacific spent over \$22 million to advertise and promote bathroom tissue sold under the **ANGEL**
 22 **SOFT** Trademarks. *Id.* Georgia-Pacific's advertisements and promotions for its **ANGEL**
 23 **SOFT®** toilet paper prominently feature the Georgia-Pacific **ANGEL SOFT®** trade dress,
 24 either through a photograph of the **ANGEL SOFT®** wrapper, or by featuring its color scheme of
 25 bold turquoise and peach, with its distinctive trademarked "Angel Soft" script printed in white
 26 text surrounded by turquoise and outlined in peach. *See id.* ¶ 17.

27 Georgia-Pacific has widely advertised and promoted the **ANGEL SOFT®** brand in
 28 variety of ways. In the U.S., this advertising has consisted of television commercials, print

1 publications, radio commercials, billboards, live promotions, sponsorship of large events, trade
 2 shows, brochures, and internet promotions—just to name a few. *Id.* ¶ 13; Exs. 11-22. This
 3 advertising and promotion has been continuous, and also has included numerous large-scale
 4 campaigns that have stood out for consumers. Some examples include the “Angels in Action”
 5 and “Bathroom Moments” campaigns, which received significant media attention and coverage.
 6 *Id.* ¶ 15. Notably, Georgia-Pacific also directs a substantial portion of its advertising for the
 7 **ANGEL SOFT** Trademarks toward the Spanish-speaking market. Since 2005, Georgia-Pacific
 8 has paid for numerous targeted television and radio advertisements in this market. *Id.* ¶ 14.

9 Georgia-Pacific has promoted its **ANGEL SOFT®** brands in a variety of other ways as
 10 well, including via the internet. In 2003, Georgia-Pacific created a website
 11 (www.angelsoft.com) specifically to promote its **ANGEL SOFT** Trademarks and products. *Id.*
 12 ¶ 16; Exs. 22-25. This website currently receives an average of 4,145 visitors per month. *Id.*
 13 Georgia-Pacific also distributes point of sale materials that promote the **ANGEL SOFT**
 14 Trademarks and products. *Id.* ¶ 17; Exs. 26 & 27.

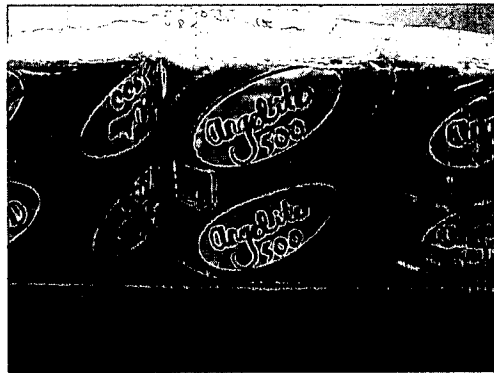
15 Through over sixty years of advertising and promotion of the **ANGEL SOFT®** brand,
 16 and by virtue of millions of dollars in marketing and advertising expenditures, the **ANGEL**
 17 **SOFT®** brand has become well-known among consumers. The **ANGEL SOFT** Trademarks,
 18 which serve to identify the **ANGEL SOFT®** brand, thus are extremely valuable to Georgia-
 19 Pacific.

20 **D. Defendants’ Sale and Distribution of Confusingly Similar “Angelite”**
 21 **Bathroom Tissue**

22 Georgia-Pacific recently became aware that Defendants Lee’s General Toys, a privately-
 23 owned California corporation, with a principal place of business at 3389 East 50th Street,
 24 Vernon, California 90058, and Mr. John Lee, the registered owner of Lee’s General Toys, are
 25 importing, marketing, and distributing a variety of bathroom tissue products under the name
 26 “Angelite,” including “Angelite 500,” “Angelite 525,” and “Angelite 1500.” Declaration of
 27
 28

1 Darwin Wisdom ("Wisdom Decl.") ¶ 3.¹ Georgia-Pacific's investigation has confirmed that
 2 Lee's General Toys operates a warehouse facility through which these "Angelite" products are
 3 distributed. *Id.* ¶ 4; Exs. 2-7. "Angelite" bathroom tissue products are imported by Defendant
 4 Lee, on behalf of Lee's General Toys, directly from China. *Id.* ¶ 5.

5 Samples of "Angelite" bathroom tissue products have been purchased from retail stores
 6 in the San Diego area. Pissot Decl. ¶ 2. As shown by the photographs below, the "Angelite"
 7 products for sale in the San Diego area bear marks and images that are confusingly similar to the
 8 **ANGEL SOFT** Trademarks:



16 Defendants' bathroom tissue wrappers all display the name "Angelite" printed in text that
 17 is strikingly similar to that employed by Georgia-Pacific on its **ANGEL SOFT®** bathroom
 18 tissue product packaging. Each variety of "Angelite" bathroom tissue is sold in a wrapper
 19 having a pink background, with a white oval in the foreground containing the stylized text
 20 "Angelite" printed in a font nearly identical to the unique font found on the wrapper of the
 21 corresponding **ANGEL SOFT®** bathroom tissue packaging associated with Georgia-Pacific's
 22 **ANGEL SOFT** Trademarks. Given these substantial similarities in product labeling and
 23 package design, there can be no doubt of Defendants' intent to confuse consumers and trade off
 24 Georgia-Pacific's extensive goodwill in its **ANGEL SOFT** Trademarks and trade dress.

25
 26 ¹ Lee's General Toys also is the owner of a California trademark registration for the mark
 27 "Angel Lite 500" in a stylized design. Wisdom Decl. ¶ 3; Ex. 1. This registration was
 28 improperly granted, as Georgia-Pacific has used in commerce and obtained federally registered
 trademarks that are strikingly similar and well-known prior to the purported use and registration
 of Lee's General Toys' "Angelite" mark for the same type of goods. See Cal. Bus. & Prof. Code
 §§ 14281 & 14282.

III. STANDARD FOR RELIEF

A temporary restraining order is a form of preliminary injunctive relief issued to preserve the status quo and prevent irreparable harm until a full hearing can be held. *Granny Goose Foods, Inc. v. B'hood of Teamsters*, 415 U.S. 423, 439 (1974). The same standards apply to the issuance of a temporary restraining order as apply to the issuance of a preliminary injunction. *See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); *Woodrow F. Morgan, Inc. v. United States*, 670 F. Supp. 289, 290 (E.D. Cal. 1987). If anything, the standards for issuance of a TRO are less rigid than those for issuance of a preliminary injunction. *Los Angeles Unified Sch. Dist. v. U.S. Dist. Court*, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J., dissenting).

Courts in the Ninth Circuit are guided by the following standards for the issuance of preliminary injunctive relief:

To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases.

Big Country Foods, Inc. v. Board of Educ., 868 F.2d 1085, 1088 (9th Cir. 1989) (internal citations omitted); *see also GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204-05 (9th Cir. 2000) (same); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999) (same). Thus, even if the court is uncertain of the moving party's likelihood of success on the merits, a TRO still may issue if the moving party convinces the court that the balance of hardships tips in its favor. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003); *see also Nat'l Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984) ("The greater the relative hardship to the moving party, the less probability of success on the merits must be shown.").

Where a plaintiff demonstrates a likelihood of success on the merits of a trademark infringement claim, irreparable harm is presumed. *GoTo.com*, 202 F.3d at 1205 n.4. "This presumption effectively conflates the dual inquiries of this prong into the single question of

whether the plaintiff has shown a likelihood of success on the merits.” *Id.*; see also *Duncan McIntosh Co., Inc. v. Newport Dunes Marina LLC*, 324 F. Supp. 2d 1078, 1082-83 (C.D. Cal. 2004). Thus, a temporary restraining order should issue if the plaintiff can show “a fair chance of success on the merits or questions . . . serious enough to require litigation.” *Sports Form, Inc. v. United Press Intl, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982).² As detailed below, the standard for preliminary injunctive relief is met under the facts of this case.

IV. ARGUMENT

A. Georgia-Pacific Is Likely to Succeed on the Merits of Its Trademark Infringement Claim³

To prove its claim of trademark infringement under Section 32 of the Lanham Act, 11 U.S.C. § 1114,⁴ Georgia-Pacific must establish that (1) it owns the trademarks at issue; (2) the defendant has used in commerce, without authorization, a copy, reproduction, counterfeit or colorable imitation of the mark in connection with the sale, distribution, or advertising of goods and services; and (3) the defendant’s use of the mark is likely to cause confusion or to cause mistake or to deceive. *E.g., Brookfield Commc’n, Inc. v. W. Coast Entm’t Co.*, 174 F.3d 1036, 1060 (9th Cir. 1999). As detailed below, Georgia-Pacific can establish each of these elements and therefore is likely to succeed on the merits of its trademark infringement claim.

1. Georgia-Pacific Owns the ANGEL SOFT Trademarks at Issue

First, Georgia-Pacific owns each of the ANGEL SOFT Trademarks infringed by the “Angelite” products. Georgia-Pacific and its predecessors in interest have applied for and

² Courts in this judicial district and elsewhere have not hesitated to grant preliminary relief to prevent the infringement of valuable trademark rights. See, e.g., *Pacific Law Center v. Saadat-Nejad*, 2007 WL 2005257 (S.D. Cal. Apr. 27, 2007) (unpublished preliminary injunction order); *Honor Plastic Indus. Co. LTD. v. Lollicup USA, Inc.*, 466 F. Supp. 2d 1217 (E.D. Cal. 2006); *CSC Brands LP v. Herdez Corp.*, 191 F. Supp. 2d 1145 (E.D. Cal. 2001); *Electropix v. Liberty Livewire Corp.*, 178 F. Supp. 2d 1125 (C.D. Cal. 2001).

³ For reasons similar to those explained *infra*, Georgia-Pacific is likely to succeed on the merits of its claim for common law trademark infringement.

⁴ 15 U.S.C. § 1114(1) imposes liability for trademark infringement upon “[a]ny person who shall, without the consent of the registrant (a) use in commerce any reproduction, counterfeit copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any good or services on or in connection with such use is likely to cause confusion, or to cause mistake, or to deceive.”

1 obtained federal trademark registrations for several trademarks bearing the words "Angel Soft."
 2 Towle Decl. ¶ 7. These trademarks include Registration Numbers 781,414; 1,172,215;
 3 2,512,417; 2,912,982; 2,972,819; and 2,989,711. *Id.*; *see also supra* at 3.

4 Georgia-Pacific is the current owner of each ANGEL SOFT Trademark by virtue of a
 5 valid assignment. Specifically, Registration Number 781,414 was originally applied for by
 6 Angel Soft Tissue Mills, Inc., which then assigned its rights to Hudson Pulp & Paper Corp.,
 7 which then assigned its rights to Georgia-Pacific Corp., which then assigned its rights to
 8 Georgia-Pacific Consumer Products LLC, which finally assigned its rights in 2006 to Georgia-
 9 Pacific Consumer Products LP. Towle Decl., Ex. 3. Similarly, Registration Number 1,172,215
 10 originally was applied for and obtained by Hudson Pulp & Paper Corp., which assigned its
 11 rights to Georgia-Pacific Corp., which then assigned its rights to Georgia-Pacific Consumer
 12 Products LLC, which finally assigned its rights in 2006 to Georgia-Pacific Consumer Products
 13 LP. *Id.*, Ex. 4. Finally, Registration Numbers 2,512,417; 2,912,982; and 2,989,711 originally
 14 were applied for and obtained by Georgia-Pacific Corp., which then assigned its rights to
 15 Georgia-Pacific Consumer Products LLC, which finally assigned its rights in 2006 to Georgia-
 16 Pacific Consumer Products LP. *Id.*, Exs. 5, 6, 8.

17 **2. Defendants' Use of Confusingly Similar Marks Is Unauthorized**

18 Second, Defendants' distribution and/or sale of "Angelite" bathroom tissue products is an
 19 unauthorized commercial use of Georgia-Pacific's registered ANGEL SOFT Trademarks.

20 **3. There Is a Likelihood of Confusion Between Georgia-Pacific's** 21 **ANGEL SOFT® Bathroom Tissue and Defendants' "Angelite"** **Bathroom Tissue**

22 Finally, Defendants' use of substantially similar marks and images in connection with
 23 their "Angelite" bathroom tissue products creates a strong likelihood of consumer confusion.

24 In evaluating whether a likelihood of confusion exists, courts within the Ninth Circuit
 25 generally consider eight factors: (1) the strength of the trade dress; (2) the proximity or
 26 relatedness of the goods; (3) the similarity of the trade dresses; (4) evidence of actual confusion;
 27 (5) the marketing channels used; (6) types of goods and the degree of care likely to be exercised
 28 by the purchaser; (7) the defendant's intent in selecting the trade dress; and (8) the likelihood of

expansion of product lines. *GoTo.com*, 202 F.3d at 1205; *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (“*Sleekcraft*”). “The court need not address all of the factors, nor must the claimant establish that each weighs in [its] favor in order to establish a likelihood of confusion.” *Glow Indus. v. Lopez*, 273 F. Supp. 2d 1095, 1116-17 (C.D. Cal. 2003). Rather, “[s]ome factors are much more important than others, and the relative importance of each individual factor will be case-specific. Although some factors—such as the similarity of the mark and whether the two companies are direct competitors—will always be important, it is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the factors.” *Brookfield*, 174 F.3d at 1054.

Applying the “*Sleekcraft*” factors here shows that virtually all of the factors point to a high likelihood of confusion between the Defendants’ “Angelite” marks and images and Georgia-Pacific’s **ANGEL SOFT** Trademarks.

a. The Strength of Georgia-Pacific’s ANGEL SOFT Trademarks

Strong marks generally are afforded greater protection than weak ones. *Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 506 (9th Cir. 1991) (“[a] strong mark is inherently distinctive” and “will be afforded the widest ambit of protection from infringing uses”). The **ANGEL SOFT** Trademarks are inherently distinctive, and thus constitute strong trademarks. On the spectrum of distinctiveness, the **ANGEL SOFT** Trademarks are arbitrary—not descriptive or suggestive of the type of product—and arbitrary marks typically are strong marks. *Brookfield*, 174 F.3d at 1058; *Nutri/System, Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605 (9th Cir. 1987).

At a minimum, the **ANGEL SOFT** Trademarks are suggestive. *Brookfield*, 174 F.3d at 1058, n. 19 (“A suggestive mark conveys an impression of a good but requires the exercise of some imagination and perception to reach a conclusion as to the product’s nature”). As the court explained in *Brookfield*, “advertising expenditures can transform a suggestive mark into a strong mark . . . where, for example, that mark has achieved actual marketplace recognition.” *Id.* at 1058 (citing *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 743-44 (2d Cir. 1998)). As discussed above, Georgia-Pacific’s **ANGEL SOFT** Trademarks have been in use since 1944.

1 Consumers have associated these trademarks with Georgia-Pacific's bathroom tissue for over
 2 sixty years. Millions of dollars spent on advertising and promotion of this brand has served to
 3 solidify this correlation in the marketplace.

4 Whether the ANGEL SOFT Trademarks are classified as arbitrary or as suggestive
 5 marks, the ANGEL SOFT Trademarks are strong marks entitled to a high degree of protection.
 6 Thus, the first factor, the strength of the ANGEL SOFT Trademarks, strongly supports a finding
 7 of a likelihood of confusion.

8 **b. Proximity or Relatedness of the Goods**

9 When goods are related, "the danger presented is that the public will mistakenly assume
 10 there is an association between the producers of the related goods, though no such association
 11 exists." *Sleekcraft*, 599 F.2d at 350. Here, putting issues of quality aside, Georgia-Pacific's
 12 ANGEL SOFT® products and Defendants' virtually identical "Angelite" products
 13 unquestionably are related in that both are bathroom tissue products. When virtually identical
 14 marks are used in connection with related products, likelihood of confusion follows as a "matter
 15 of course." *Brookfield*, 174 F.3d at 1056; *Lindy Pen Co v. Bic Pen Corp.*, 796 F.2d 254, 256-57
 16 (9th Cir. 1986). Furthermore, these bathroom tissue products are sold in many of the same types
 17 of stores, *see* Pissot Decl. ¶ 2, thereby increasing the likelihood that consumers will confuse the
 18 infringing product for the genuine product. *Cf. Sleekcraft*, 599 F.2d at 350 (less similarity
 19 between marks required when goods are sold to the same class of purchasers). Accordingly, the
 20 second *Sleekcraft* factor, the proximity and relatedness of the goods, also supports the existence
 21 of a likelihood of confusion.

22 **c. Similarity of the ANGEL SOFT Trademarks and the**
 23 **"Angelite" Marks and Images**

24 The ANGEL SOFT Trademarks and the marks and images found on the "Angelite"
 25 bathroom tissue products are strikingly similar. A side-by-side comparison of the two products
 26 illustrated above, *supra* at 2, confirms the similarities, especially in light of the fact that
 27 "Angelite" products may be found in the very types of retail stores where consumers would
 28 expect to find ANGEL SOFT® products.

1 While the "Angelite" products do not also copy the word "Soft," it is the use of the word
 2 "Angel" in the product labeling that is sure to cause consumer confusion. In fact, several of the
 3 **ANGEL SOFT** Trademarks (specifically, Registration Numbers 781,414; 1,172,215; 2,512,417;
 4 2,972,819) were issued only if the word "Soft" was disclaimed from protection. Towle Decl.,
 5 Exs. 3-5, 7. It is thus the use of the word "Angel" that is so valuable in identifying Georgia-
 6 Pacific's goods.

7 In addition, as shown in the photograph below, the "Angelite" product employs a font
 8 that is remarkably like that protected by **ANGEL SOFT** Trademark Registration Number
 9 2,512,417:



**Angel
Soft**

15 The overall striking similarity between the Georgia-Pacific' **ANGEL SOFT** Trademarks
 16 and the marks and images used in conjunction with Defendants' "Angelite" product line
 17 therefore strongly support a likelihood of confusion. *See Lois Sportswear U.S.A., Inc. v. Levi*
 18 *Strauss Co.*, 799 F.2d 867, 873 (2d Cir. 1986).

19 d. Actual Confusion

20 Georgia-Pacific has not yet developed substantial evidence of actual confusion. Georgia-
 21 Pacific expects to develop evidence of substantial confusion during the course of discovery and
 22 further investigation in connection with this action. Courts have consistently recognized that
 23 evidence of actual confusion is often difficult to obtain, and thus undue weight should not be
 24 accorded to this factor. *Brookfield*, 174 F.3d 1050; *see also E & J Gallo Winery v. Gallo Cattle*
 25 *Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992) ("Evidence of actual confusion is relevant to the issue
 26 of likelihood of confusion, but the absence of such evidence need not create an inference that
 27 there is no likelihood of confusion.").

e. **Marketplace Factors**

When, as here, convergent marketing channels are employed, the likelihood of confusion is increased. *Sleekcraft*, 599 F.2d at 353. Georgia-Pacific's ANGEL SOFT® and Defendants' "Angelite" bathroom tissue products are sold at many of the same types of retail establishments. *Compare* Towle Decl. ¶ 11 with Pissot Decl. ¶ 3. When sold in the same location, the products would ordinarily be sold on the same shelf, where space is limited and packed tightly together. *Id.* Thus, Defendants' products will likely be sold in close proximity to Georgia-Pacific's ANGEL SOFT® bathroom tissue in such locations. This further increases the likelihood that consumers will purchase one brand of bathroom tissue believing it to be the other. Because the two products will be sold through the same types of retail channels and next to or close to one other on retail shelves, this factor also supports a finding of likely confusion.

f. **The Types of Goods and Purchaser Care**

Likelihood of confusion is determined by reference to the hypothetical "reasonably prudent consumer." *Brookfield*, 174 F.3d at 1060. Such a consumer is expected "to be more discerning—and less easily confused—when purchasing expensive items." *Id.* By contrast, purchasers of relatively inexpensive goods do not exercise a high level of purchasing care, making confusion between such goods more likely. *Id.*; *E. & J. Gallo Winery*, 967 F.2d at 1293; *Beer Nuts v. Clover Club Foods Co.*, 805 F.2d 920, 928 (10th Cir. 1986).

Bathroom tissue products, such as Georgia-Pacific's ANGEL SOFT® bathroom tissue, are relatively inexpensive products that often are purchased individually or in packages of four to twenty-four rolls, and typically retailing at low prices. Due to the similarity of Defendants' products to ANGEL SOFT® bathroom tissue and given these products' relatively low prices, purchasers are likely to pick one product from crowded store shelves with little thought. Moreover, the sale of "Angelite" products in geographic areas with a high proportion of Spanish-speaking customers enhances the degree to which these consumers are likely to be confused. Indeed, these consumers may rely exclusively upon the distinctive ANGEL SOFT Trademark and graphics to identify the bathroom tissue product they prefer. The prevalence of Spanish-speaking consumers further increases the likelihood that consumers will purchase the "Angelite"

1 bathroom tissue, mistakenly believing it to be ANGEL SOFT® or associated with Georgia-
 2 Pacific. Accordingly, this factor also supports a finding of likely confusion.

3 g. **Defendants' Intent In Choosing the Marks and Images for the**
 4 **"Angelite" Bathroom Tissue**

5 Defendants are keenly aware of the tremendous commercial success of Georgia-Pacific's
 6 ANGEL SOFT® and ANGEL SOFT PS® bathroom tissue. Defendants intentionally adopted
 7 marks and images for their product similar to Georgia-Pacific's in an effort to trade upon the
 8 goodwill and success of the ANGEL SOFT® brand.

9 Defendants' choice of a name virtually identical to ANGEL SOFT®, not to mention
 10 Defendants' use of a font remarkably similar to that of Registration Number 2,512,417,
 11 demonstrates Defendants' deliberate intent to trade off Georgia-Pacific's valuable goodwill in its
 12 ANGEL SOFT® brand. It is highly unlikely that Defendants could unintentionally have chosen
 13 such a strikingly similar name and design. This factor therefore also supports a finding of a
 14 likelihood of confusion. *See Brookfield*, 174 F.3d at 1059 (noting that "if an infringer 'adopts his
 15 designation with the intent of deriving benefit from the reputation of the trademark or trade
 16 name, its intent may be sufficient to justify the inference that there are confusing similarities.'")
 17 (quoting *Pac. Telesis v. Int'l Telesis Comm'cns*, 994 F.2d 1364, 1369 (9th Cir. 1993)).

18 h. **Likelihood of Expansion of Products**

19 The final *Sleekcraft* factor is the likelihood that the parties will expand their product lines
 20 into direct competition. *Sleekcraft*, 599 F.2d at 354. Here, that expansion already has occurred:
 21 Georgia-Pacific and Defendants presently are selling confusingly-similar, directly-competing
 22 bathroom tissue products. Accordingly, this factor also supports a finding of a likelihood of
 23 confusion.

24 * * *

25 In sum, an analysis of each of the *Sleekcraft* factors supports a finding of likelihood of
 26 confusion between Georgia-Pacific's ANGEL SOFT Trademarked products and Defendants'
 27 competing "Angelite" products. Defendants adopted duplicate marks, applied them to identical
 28 goods, and intended to trade off of Georgia-Pacific's goodwill among consumers of bathroom

1 tissue products. Georgia-Pacific accordingly is likely to succeed on the merits of its Lanham Act
2 and common law trademark infringement claims.

3 **B. Georgia-Pacific Also Is Likely to Prevail Upon Its Other Claims**

4 While Georgia-Pacific's high likelihood of success with regard to its trademark
5 infringement claims is alone adequate to support the entry of preliminary injunctive relief,
6 because Georgia-Pacific also is likely to prevail upon its other causes of action, additional
7 grounds for relief exist.

8 **1. Georgia-Pacific Is Likely to Prevail in Its Trade Dress Claim**

9 Trade dress refers to "the total image, design, and appearance of a product and 'may
10 include features such as size, shape, color combinations, texture or graphics.'" *Clicks Billiards,*
11 *Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). To sustain a claim for trade dress
12 infringement, Georgia-Pacific must show: (1) that its ANGEL SOFT® trade dress is non-
13 functional; (2) that the ANGEL SOFT® trade dress serves a source-identifying role because it
14 has acquired a secondary meaning, i.e., that its trade dress is distinctive; and (3) that Defendants'
15 product creates a likelihood of consumer confusion. *Id.* at 1258. Here, each of these criteria are
16 satisfied.

17 First, none of the elements of the ANGEL SOFT® trade dress—its name, graphics, color
18 scheme and overall packaging design—are functional. *See Qualitex Co. v. Jacobsen Prods. Co.*,
19 514 U.S. 159, 165 (1995) (a product feature is functional only if it "is essential to the use or
20 purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of
21 the feature would put competitors at a significant, non-reputation related disadvantage"). Indeed,
22 the name "Angel Soft" and the overall visual impression of the combination and arrangement of
23 ANGEL SOFT® packaging, graphics, and other design elements is aesthetic, not functional.
24 There are a number of other names, graphics and package designs that Defendants could use to
25 promote their bathroom tissue without causing confusion with the ANGEL SOFT® trade dress.

26 Second, Georgia-Pacific's ANGEL SOFT® trade dress serves an identifying role
27 because of its inherent distinctiveness. The ANGEL SOFT® trade dress includes its arbitrary
28

1 name, graphics, and packaging design which intrinsically identify Georgia-Pacific as the source
2 of the product. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).⁵

3 Finally, the evidence of likelihood of confusion in this case is compelling, as discussed in
4 detail above. Accordingly, Georgia-Pacific has demonstrated a strong likelihood of success with
5 regard to its trade dress infringement claim.

6 2. Georgia-Pacific Is Likely to Prevail in Its False Designation of Origin 7 Claim

8 Under federal law, a cause of action will lie for “any false designation of origin, false or
9 misleading description of fact, or false or misleading representation of fact.” Lanham Act
10 § 43(a) (15 U.S.C. § 1125(a)). The passing off of a defendant’s products as genuine products of
11 another has long been recognized as false designation of origin under Sections 32(1) and 43(a) of
12 the Lanham Act. *See, e.g., Thelen Oil Co., Inc. v. Fina Oil & Chem. Co.*, 962 F.2d 821, 822 (8th
13 Cir. 1992); *Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 123 (3d Cir. 1989);
14 *Allegheny Car Wash Corp. v. Amoco Oil Co.*, 201 U.S.P.Q. 798, 800 (W.D. Pa. 1977).

15 To establish a violation of the Lanham Act’s prohibition against false designation of
16 origin, Georgia-Pacific must establish the same elements as are required to prove a trademark or
17 trade dress infringement claim. *See, e.g., Kwik-Site Corp. v. Clear View Mfg. Co.*, 758 F.2d 167,
18 178 (6th Cir. 1985); *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444-45 (Fed. Cir.
19 1985). As the Ninth Circuit explained in *Qualitex Co. v. Jacobsen Products Co.*, the likelihood
20

21 ⁵ Alternatively, the ANGEL SOFT® trade dress has acquired secondary meaning—“the
22 mental association by a substantial segment of consumers and potential consumers ‘between the
23 alleged mark and a single source of the product.’” *Sharper Image Corp. v. Target Corp.*, 425 F.
24 Supp. 2d 1056, 1072-73 (N.D. Cal. 2006) (quoting *Levi Strauss & Co. v. Bluebell, Inc.*, 778 F.2d
1352-54 (9th Cir. 1985)). Extensive use and advertising with regard to a particular trade dress
over a substantial period of time is enough to establish secondary meaning. *Clamp Mfg. Co. v.*
Enco Mfg. Co., 870 F.2d 512 (9th Cir. 1989).

25 As described at length above, Georgia-Pacific has been selling its ANGEL SOFT®
26 bathroom tissue products with their inherently distinctive trade dress since 1944. *Supra* at 2-3.
27 Additionally, Georgia-Pacific has spent tens of millions of dollars to advertise and to promote its
28 ANGEL SOFT® and ANGEL SOFT PS® products. *Id.* As a result of these marketing efforts
and the established ANGEL SOFT® brand, consumers associate the ANGEL SOFT® trade
dress with Georgia-Pacific and its high-quality ANGEL SOFT® bathroom tissue products. *See*
Towle Decl. ¶ 18. Collectively, these factors demonstrate that the ANGEL SOFT® trade dress
has achieved secondary meaning in the marketplace.

1 of confusion among consumers and the public is the central element of each of these claims:
 2 “[T]he ultimate test [under the Lanham Act] is whether the public is likely to be deceived or
 3 confused by the similarity of the marks. Whether we call the violation infringement, unfair
 4 competition or false designation of origin, the test is identical—is there a ‘likelihood of
 5 confusion?’” 13 F.3d 1287, 1303 (9th Cir. 1994) (quoting *New West Corp. v. NYM Co.*, 595
 6 F.2d 1194, 1201 (9th Cir. 1979)).

7 Having established a high likelihood of confusion among consumers of bathroom tissue
 8 products between the origins of “Angelite” products and Georgia-Pacific’s ANGEL SOFT® and
 9 ANGEL SOFT PS® brands of bathroom tissue, Georgia-Pacific also is likely to prevail upon its
 10 false designation of origin claim.

11 3. Georgia-Pacific Is Likely to Prevail in Its Unfair Competition Claim

12 State common law claims of unfair competition and actions brought pursuant to
 13 California Business and Professions Code Section 17200 are “substantially congruent” to claims
 14 made under the Lanham Act. *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994);
 15 *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446,
 16 1457 (9th Cir. 1991); *see also Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th
 17 Cir. 1988) (the “ultimate test” with respect to both a claim brought under the Lanham Act and
 18 one brought pursuant to California Business and Professions Code § 17200 is “whether the
 19 public is likely to be deceived or confused by the similarity of the marks”); *Meta-Film Assocs.,*
 20 *Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1362 (C.D. Cal. 1984) (unfair misappropriation under the
 21 Lanham Act parallel to wrongful unfair competition under § 17200). Because these claims are
 22 substantially congruent, Georgia-Pacific is likely to succeed with regard to its § 17200 claim of
 23 unfair competition, just as it is likely to succeed with its trademark and trade dress infringement
 24 claims, discussed above.

25 C. Georgia-Pacific Has Established Irreparable Injury as a Result of 26 Defendants’ Conduct

27 Because Georgia-Pacific has demonstrated a likelihood of confusion, irreparable injury is
 28 presumed. *GoTo.com*, 202 F.3d at 1205 n.4; *see also Metro Publishing, Ltd. v. San Jose*

1 *Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993) ("Once the plaintiff has demonstrated a
 2 likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if
 3 injunctive relief is not granted."). Furthermore, Defendants' infringement of the **ANGEL SOFT**
 4 Trademarks creates more than just a presumption of irreparable harm to Georgia-Pacific.
 5 Georgia-Pacific has spent decades and, in just the past year alone, over \$22 million dollars
 6 advertising and promoting the **ANGEL SOFT®** product line. Towle Decl. ¶ 12. As a result, the
 7 **ANGEL SOFT** Trademarks have become extremely valuable assets to Georgia-Pacific as
 8 identifiers of its goods and of the substantial goodwill Georgia-Pacific has earned over its years
 9 in the market. *Id.* Consumers inadvertently purchasing the "Angelite" product thinking it was
 10 **ANGEL SOFT®** bathroom tissue will be extremely disappointed by the inferior quality. Such a
 11 misperception among consumers would irreparably tarnish and damage the substantial goodwill
 12 that Georgia-Pacific has built in the **ANGEL SOFT®** product line. Preliminary injunctive relief
 13 is therefore critical to preventing Defendants' trademark infringement from irreparably injuring
 14 Georgia-Pacific. See *Rent-A-Center, Inc. v. Canyon Television & Appliance*, 944 F.2d 597, 603
 15 (9th Cir. 1991).

16 **D. The Balance of Hardships Favors Granting Preliminary Injunctive Relief**

17 Because Georgia-Pacific has established both a likelihood of success on the merits and
 18 irreparable harm, the Court may grant preliminary injunctive relief on that basis alone.
 19 *GoTo.com*, 202 F.3d at 1204-05. Nevertheless, consideration of the balance of the hardships also
 20 weighs in favor of preliminary injunctive relief.

21 Georgia-Pacific has spent many years and millions of dollars developing and promoting
 22 its **ANGEL SOFT®** and **ANGEL SOFT PS®** products, which are well-recognized and very
 23 successful. Despite this success, as a result of Defendants' conduct, Georgia-Pacific stands to
 24 lose much of the goodwill it has worked so hard to gain. Consumers who purchase "Angelite"
 25 products thinking that they are Georgia-Pacific products inevitably will be disappointed and
 26 consequently may never again hold Georgia-Pacific in the same regard.

27 Defendants, by contrast, have made no investment in the **ANGEL SOFT®** and **ANGEL**
 28 **SOFT PS®** name, high-quality, or packaging design. Nothing prevents Defendants from

1 distributing, marketing, and selling bathroom tissue products under another name and with
2 another design. Thus, if Defendants are prohibited from distributing and selling their infringing
3 products in packaging that is substantially similar to Georgia-Pacific's trademarks and trade
4 dress, Defendants will remain free to distribute, market, and sell their bathroom tissue products
5 under another name and with a different, unique design.

6 Preliminary injunctive relief will prevent Defendants only from continuing to mislead the
7 public by distributing and selling the misleading "Angelite" product. This minimal "hardship" to
8 Defendants is far outweighed by the undisputed and continuing injury to Georgia-Pacific's
9 business reputation and goodwill. Accordingly, the balance of hardships tips decidedly in favor
10 of the issuance of a temporary restraining order and preliminary injunction prohibiting the sale
11 and distribution of "Angelite" products.

12 **E. Preliminary Injunctive Relief Would Serve the Public Interest**

13 Finally, preliminary injunctive relief in favor of Georgia-Pacific would serve the public
14 interest. "It is well established that trademark law protects not only the private interests of the
15 trademark owner but also the public's interest in not being confused by the infringing
16 products. . . . Thus, the purchasing public is an unnamed party in every action for trademark
17 infringement." *Phillip Morris USA Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1075 (C.D. Cal.
18 2004). Here, the grant of preliminary injunctive relief is necessary to protect consumers from the
19 harm that would arise from confusion between Georgia-Pacific's ANGEL SOFT® bathroom
20 tissue and Defendants' inferior "Angelite" product. Accordingly, this factor also supports the
21 grant of preliminary injunctive relief.

1 **V. CONCLUSION**

2 For the foregoing reasons, Georgia-Pacific respectfully requests that the Court grant a
3 temporary restraining order and a preliminary injunction enjoining Defendants from promoting
4 and marketing their "Angelite" bathroom tissue products.

5 Dated: December 20, 2007

Respectfully submitted,

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